RECORD AND BRIEF

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In The
Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF INSTITUTE FOR JUSTICE, CAROLE HINDERS, RANDY AND KAREN SOWERS, AND DKT LIBERTY PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society, including property rights and the Fourth Amendment right to be free from warrantless government surveillance.

Three of the *amici* – Carole Hinders and Randy and Karen Sowers – are Institute for Justice clients from whom the Internal Revenue Service (IRS) wrongfully seized over $90,000. In their cases, the government relied on the Third Party Doctrine to scrutinize *amici*'s banking habits without a warrant, and so intruded on the details of *amici*'s daily lives without establishing probable cause before a neutral magistrate. In both cases, the government used this sweeping surveillance power to identify a pattern of less than $10,000 cash deposits, which, according to one IRS agent, rose to the level of "structuring" in violation of federal bank reporting laws. (A thorough investigation would have revealed that *amici* ran small businesses that relied on cash and made frequent deposits below $10,000.) *Amici* were not charged with "structuring" or any other crime. Even so, the categorical approach to the Third Party Doctrine made it possible for the government to secretly review their bank records and wrongfully seize their accounts. Using civil forfeiture,

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

the government forced *amici* to litigate, at their own expense, for the return of their money. And, because the federal government keeps 100% of property it successfully forfeits, the IRS had a direct profit incentive in those proceedings. *Amici* fought back and, with the Institute for Justice representing them pro bono, their money was eventually returned – 21 months later in Carole's case and four years later in Randy and Karen's case.

What happened to Carole, Randy, and Karen was only possible because, under this Court's precedents, information a person conveys to a bank is categorically excluded from Fourth Amendment protection. If the same categorical rule were applied to the cell-site-location information (CSLI) at issue in this case, innocent Americans would be caught up in dragnet searches of their CSLI, just as Carole, Randy, and Karen were caught up in dragnet searches of their bank records. It is *amici*'s hope that their experiences will lead the Court to reject the categorical approach to the Third Party Doctrine and, instead, apply a real-world approach. Specifically, in determining whether CSLI requires Fourth Amendment reasonableness analysis (and, ultimately, a warrant), *amici* urge the Court to take account of the privacy protections available to private parties under statutes and contracts.

Amicus DKT Liberty Project is a nonprofit dedicated to promoting individual liberty and defending the right to privacy. Founded in 1997, the Liberty Project has participated as *amicus* in this Court several

times, including in *Riley v. California*, 134 S. Ct. 2473 (2014). Like *Riley*, this case concerns the privacy of information generated by Americans' cell phones – their modern day papers and effects. The smartphone is a computer, creating and holding countless private papers, and potentially providing government with a trove of information about a person, their home, business, and family members. Because of the Liberty Project's experience protecting Americans' privacy from government overreach, it is well situated to provide this Court with additional insight into the question presented in this case.

SUMMARY OF ARGUMENT

This case is about the intersection of cutting edge technology and the Fourth Amendment, so it is understandable that the parties are focused on the future of CSLI. In deciding that important future, however, *amici* urge this Court to be mindful of the past.

This brief explains why the categorical approach to the Third Party Doctrine announced in *United States v. Miller* is a poor foundation on which to build the Fourth Amendment's future. *Miller* categorically exempted from Fourth Amendment protection *any* information a person provides to their bank, under *any* circumstances. In the 41 years since, this categorical reasoning has given law enforcement license to monitor virtually every bank account in the country looking for suspicious activity. Technological advances have

made possible ever-more comprehensive bank surveillance so that, today, the federal government collects at least 12 times more bank information *every day* as it collected in an *entire year* when *Miller* was decided. All of this surveillance occurs with zero judicial oversight.

At the same time, civil forfeiture has metastasized from a legal backwater into a favored tool of law enforcement – a tool that has combined with the categorical approach to the Third Party Doctrine to endanger the rights of ordinary Americans. Law enforcement has come to rely on civil forfeiture because it allows them to take property without charging (let alone convicting) anyone with a crime. And, because federal agencies keep 100% of the proceeds of everything they forfeit, they have a direct financial incentive to seize more and more property. While *Miller* has given the government the *means* to monitor Americans' banking practices, the profit incentive to pursue civil forfeiture has provided a powerful *motive* to do so. As a result, federal agents now troll Americans' banking information looking for property they can seize, putting the burden on property owners to fight back at their own expense.

As *amici*'s experiences show, the federal government uses this power to devastating effect. Take for instance *amici* Carole Hinders and Randy and Karen Sowers, who endured civil forfeiture nightmares based on innocent banking behavior. Under *Miller*, the government was able to secretly monitor *amici*'s bank records. Based on a cursory review of those records, the

government seized their bank accounts without any criminal charges. In the end, *amici* were successful in getting their money back, but it took more than 21 months in Carole's case and more than four years in the Sowers' case. And their experiences are far from unique.

Thus, what the Court envisioned – in *Miller* – as the piecemeal collection of bank records for criminal prosecutions has become a nationwide surveillance program devoted in substantial part to civil forfeiture actions. This unanticipated expansion of *Miller* should give this Court pause as it considers what Fourth Amendment rule to apply to CSLI.

Amici urge the Court to reject the categorical approach to the Third Party Doctrine. Applied to the CSLI at issue in this case, the categorical approach would result in the same type of dragnet surveillance the nation has experienced in the banking context. This outcome would only add fuel to the government's already out-of-control forfeiture machine. Like bank information collected without a warrant, CSLI can – and would – be used to justify civil forfeiture proceedings against innocent people.

In place of the categorical approach, the Court should adopt a real-world approach to the Third Party Doctrine that uses predictable standards derived from positive law. This approach would weigh the statutes and private contracts that restrain a private person's access to information that the government seeks to obtain without a warrant. Fourth Amendment

reasonableness standards would govern whenever a private person would violate the law by obtaining the same information without the suspect's consent. Rather than giving the government blanket license to collect and troll the CSLI of every American, this approach would interpose judicial checks and balances based on predictable standards

ARGUMENT

I. In Answering the Question Presented, This Court Should Be Mindful of How Its Decision in *United States v. Miller* Has Negatively Impacted Ordinary Americans.

The question presented asks whether the warrantless search of CSLI is permissible under the Fourth Amendment. *See* Brief for Petitioner at i. When this Court answered a similar question 41 years ago in the banking context, it applied a categorical rule, holding that defendants have no reasonable expectation of privacy in personal information that they shared with their banks, regardless of any private agreements that required the bank to keep such information confidential. *United States v. Miller*, 425 U.S. 435, 445 (1976). Then, as now, banks were required to collect vast amounts of information about their customers and convey it to the government under the Bank Secrecy Act.[2]

[2] Shortly before *Miller*, this Court upheld the constitutionality of the Bank Secrecy Act, holding that banks can be required to

Miller has made it possible for the government to systematically collect this information – and more – without any judicial determination of probable cause to believe a crime has been committed. As *amici*'s experiences show, federal agents use this power to troll Americans' bank records for property that can be forfeited. This has led to innocent people – people like *amici* – being swept up in civil forfeiture proceedings in which they are never charged with, let alone convicted of, a crime.

The past is prologue: The troubling expansion of the Third Party Doctrine under *Miller* cautions against using similar categorical reasoning in this case.

A. *Miller* adopted a categorical approach to the Third Party Doctrine that has transformed the Bank Secrecy Act into a general warrant for federal agents to monitor people's bank accounts.

Amici agree with Petitioner that the bank records in *Miller* and the telephone numbers in *Smith v. Maryland*, 442 U.S. 735 (1979), offer a poor basis for comparison to the CSLI at issue in this case. *See* Brief for Petitioner at 35-47. This brief seeks to make an additional point: The categorical approach to the Third Party Doctrine adopted in *Miller* (and applied in *Smith*) has led to innocent people being swept up in dragnet searches of their banking practices. Although

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collect information about their customers. *See California Bankers Assoc. v. Shultz*, 416 U.S. 21 (1974).

Miller and *Smith* involved criminal prosecutions, law enforcement now uses the sweeping authority of the Third Party Doctrine as a tool to seize and take legal possession of people's property through civil forfeiture, often with no criminal charges.

Like this case, *Miller* involved a criminal defendant – a man suspected of operating an illegal whiskey distillery. *See* 425 U.S. at 436. After a fire broke out in a warehouse he rented, local police discovered a large whiskey operation there. *Id.* at 437. Federal authorities took over the investigation and built their case, in part, by subpoenaing two banks Miller had used – demanding copies of his checks, deposit slips, and financial statements. *Id.* at 437-38. At the time, banks were required to keep this information (just as they are today) under the Bank Secrecy Act, 12 U.S.C. § 1829b(d). 425 U.S. at 440-41. Miller's bank records provided the government with "one or two" leads in the investigation and, at trial, several checks were introduced to demonstrate a conspiracy to defraud the United States of whiskey taxes. *See id.* at 436, 438.

After a jury convicted him, Miller appealed, arguing that before the government could constitutionally obtain records from his bank, agents needed a warrant signed by a judge – not just a subpoena. This Court rejected that argument, holding "there was no intrusion into any area in which [Miller] had a protected Fourth Amendment interest." *Id.* at 440. The Court reasoned that the records "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," and that,

therefore, Miller had "take[n] the risk, in revealing his affairs to another, that the information w[ould] be conveyed by that person to the Government." *Id.* at 442-43. The Court also rejected Miller's argument, based on *Katz v. United States*, 389 U.S. 347, 353 (1967), that he had a "reasonable expectation of privacy" in his bank records because "they [were] merely copies of personal records that were made available to the banks for a limited purpose." 425 U.S. at 442. The Court explained it had "held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, *even if the information is revealed on the assumption that it will be used only for a limited purpose*." *Id.* at 443 (emphasis added).

This last phrase, in particular, has cemented the current approach to the Third Party Doctrine in place, making it resistant to change in an era of rapid technological advancement. By excluding from Fourth Amendment protection even information that two private parties have contractually agreed to keep confidential, *Miller* has made it impossible for banks to offer greater privacy, leaving no way for expectations of privacy to change over time. Banks are, in fact, legally prohibited from offering their customers any privacy against warrantless government surveillance. Agreements to the contrary would only be misleading: No bank can provide a meaningful shield against the broad subpoena power of U.S. law enforcement under *Miller*. *See, e.g.*, *United States v. Sturman*, 951 F.2d 1466, 1483-84 (6th Cir. 1991) (holding that, despite

stronger privacy protections available in Switzerland, records of a Swiss bank could be secretly subpoenaed without invading the depositor's Fourth Amendment rights). Indeed, under this Court's precedents, people have no right to *know* that the government has required their bank to hand over financial information. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) (holding that the targets of subpoenas have no Fourth Amendment right to notification when their banks are served). Even without a subpoena, banks are legally required to report "suspicious" activity and prohibited from notifying customers about the report. 31 U.S.C. § 5318(g); 12 C.F.R. § 21.11. As a result, there is no way to "opt out" of this massive surveillance program.

Thus, while *Miller* involved subpoenas issued by a United States Attorney, today a bank would almost certainly deliver the same information to the government as a matter of course, under the Bank Secrecy Act. Even when banks *are* subpoenaed, there is no judicial scrutiny of any kind. No proof of a crime is necessary. No threshold standard of proof needs to be satisfied. Mere "suspicion" is enough, whether on the part of a government agent or a single bank teller. As the next two sections show, federal authorities make full use of this sweeping power to secretly review people's banking information, to disastrous effect for innocent property owners like Carole Hinders and Randy and Karen Sowers.

B. Federal agents now routinely surveil the everyday banking practices of ordinary Americans looking for property to forfeit.

When *Miller* was decided in 1976, as a practical matter, the government could not obtain anything like a comprehensive view of Americans' bank records. The year before, in 1975, banks filed a mere 3,418 currency transaction reports, in which they disclosed suspicious banking behavior to the Treasury Department. *See* Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla. L. Rev. 287, 295 n.39 (1989). Contrast that with the present: In 2014, banks filed more than *15 million* currency transaction reports – over 41,000 each day – according to the director of the Treasury Department's Financial Crimes Enforcement Network (FinCEN). Jennifer Shasky Calvery, Address at the FinCEN 2015 Law Enforcement Awards Ceremony, at 2, May 12, 2015, https://www.fincen.gov/sites/default/files/2016-08/20150512.pdf. In other words, there are 12 times more currency transaction reports filed in a *single day* now than in the *entire year* before *Miller* was decided. And FinCEN has granted "more than 10,000 agents, analysts, and investigative personnel from over 350 unique agencies across the U.S. Government [] direct access to the reporting," the director noted. *Id.* at 4. As a result of technological advances, these thousands of agents, across hundreds of agencies, can now comprehensively review this trove of information

based on their own initiative, without a warrant or even a subpoena.

While the Third Party Doctrine provides law enforcement with the means to review troves of banking data, civil forfeiture provides a powerful financial incentive to do so. As one member of this Court recently observed, civil forfeiture has become "highly profitable." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). Indeed, like law enforcement agencies in many states, federal agencies either keep property they forfeit or keep 100% of the proceeds. *See* 18 U.S.C. § 981(e). This has led to an explosion of forfeiture activity. The year the Department of Justice's Assets Forfeiture Fund was established, in 1986, it took in just $93.7 *million* in deposits. *See* Institute for Justice, D. Carpenter, L. Knepper, A. Erickson, J. McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. Nov. 2015), at 10, http://ij.org/report/policing-for-profit/. By 2014, annual deposits had increased 4,667% to $4.5 *billion*. *Id.* Much of this increase occurred in the last decade and a half: From 2001 to 2014, the Justice and Treasury departments deposited $29 billion in forfeiture funds, an increase of more than 1,000% over that 13-year period.[3] *Id.* As Justice Thomas observed: "This

[3] Net assets in the Justice and Treasury department's forfeiture accounts – the amount of money retained after paying various obligations – increased 485% between 2001 and 2014. Institute for Justice, *Policing for Profit*, at 10. Net assets topped $1 billion for the first time in 2007 and ballooned to nearly $4.5 billion by 2014. *Id.*

system – where police seize property with limited judicial oversight and retain it for their own use – has led to egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848. The injustice of allowing agencies to profit from forfeitures is only compounded by the fact that "forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*

Not surprisingly, the staggering collection of data authorized in *Miller* has contributed to the explosion of forfeiture activity. In 2008, the Government Accountability Office surveyed local and state agencies with access to currency transaction report data. More than half said the reports "identified assets that were previously unknown, including those that could be used for forfeiture action." U.S. GAO Report, Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts, GAO-08-355 (Feb. 2008), at 20, http://www.gao.gov/assets/280/272447.pdf. With virtually limitless data at their fingertips and a strong incentive to find forfeiture dollars, police and prosecutors have every reason to search for more forfeiture cases.

As the next section demonstrates, this is exactly what federal authorities have done: They use the staggering amount of banking information available under *Miller* to look for opportunities to seize money from people, many of whom have done nothing wrong.

C. As a result of *Miller*, even people who have done nothing wrong – people like *amici* – are finding themselves targeted for civil forfeiture without being charged with a crime.

Although *Miller* involved a criminal defendant, the categorical rule that it announced now impacts even ordinary people who have done nothing wrong. The cases of Carole Hinders and Randy and Karen Sowers illustrate this troubling development.

Their cases involved an obscure federal crime known as "structuring," although Carole, Randy, and Karen were never charged with that crime (or any other crime). Just as forfeiture activity was exploding, in 1986, Congress passed the structuring law in an effort to prevent people from circumventing banks' reporting obligations under the Bank Secrecy Act. *See United States v. MacPherson*, 424 F.3d 183, 188-89 (2d Cir. 2005) (discussing purpose of the structuring laws); *United States v. Sperrazza*, 804 F.3d 1113, 1130-33 (11th Cir. 2015) (Rosenbaum, J., dissenting) (collecting legislative history). Specifically, banks are required to file currency transaction reports for all cash transactions over $10,000, and the structuring law and Treasury regulations make it unlawful to purposefully evade this reporting threshold. *See* 31 U.S.C. § 5324(a) (defining the crime of structuring); 31 C.F.R. § 1010.100(xx) (same); 31 C.F.R. § 1010.311 (setting $10,000 threshold). The reporting threshold has remained unchanged since it was put in place in 1970, *see* Welling, 41 Fla. L. Rev. at 292-93, although an inflation-adjusted figure

would now exceed $60,000.[4] Increasingly, these laws have been deployed against people accused of nothing more than doing business in cash and depositing their money in the bank in a manner that the government deems "suspicious."[5]

This is possible because, in addition to criminal penalties, "structured" deposits (and funds commingled with those deposits) are subject to civil forfeiture. *See* 31 U.S.C. § 5317(c); 18 U.S.C. § 984(a)(2). The power of federal agencies to civilly forfeit property and keep the proceeds, combined with unfettered access to bank records, has given the government both the means and the motive to seize cash from legitimate businesses.

And that is exactly what the IRS has done. From 2005 to 2012, the agency seized more than $242 million for suspected structuring violations, in more than 2,500 cases. Institute for Justice, D. Carpenter & L. Salzman, *Seize First, Question Later: The IRS and Civil*

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[4] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl (calculating that $10,000 in January 1970 was worth $64,802.91 in June 2017).

[5] *See, e.g.*, Compl. for Forfeiture (Doc. 1) ¶ 11, *United States v. $33,244.86 in U.S. Currency from TCF Nat'l Bank Account #XXXXXX6598*, No. 2:13-cv-13990-RHC-DRG (E.D. Mich. filed Sept. 18, 2013); Compl. for Forfeiture (Doc. 1) ¶ 12, *United States v. $35,651.11 in U.S. Currency Seized from PNC Account No. XXXXXX6937*, No. 4:13-cv-13118 (E.D. Mich. filed July 19, 2013); First Am. Compl. For Forfeiture *In Rem* (Doc. 15) ¶¶ 8-9, *United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account No. XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C. filed Apr. 30, 2015).

Forfeiture (Feb. 2015), at 10, http://ij.org/wp-content/uploads/2015/03/seize-first-question-later.pdf. The vast majority of those seizures – 86% – led to civil forfeiture actions, not criminal ones. *Id.* at 14. And, as the Treasury Inspector General recently determined, "structuring seizures primarily involved legal source funds from businesses." Treasury Inspector General for Tax Administration, *Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses*, Ref. No. 2013-30-025 (Mar. 30, 2017), at 9, www.treasury.gov/tigta/auditreports/2017reports/201730025fr.pdf.

Indeed, in 91% of structuring seizures reviewed by the Inspector General, there was *no evidence* that the structured funds came from an illegal source or involved any other illegal activity. *Id.* Accordingly, the IRS's forfeiture program "was not conducted in a manner consistent with its stated goal of interdicting criminal enterprises." *Id.* at 8. Instead, IRS agents acted on instructions from United States Attorney's offices to make "quick hits" of people's bank accounts based on secret reviews of their banking behavior. *Id.* at 9-10. Based on these secret reviews, the United States Attorney would then seek a seizure warrant for the money in the account. *Id.* at 9, 13-16. In 92% of such cases, the IRS interviewed property owners only *after* their accounts were seized. *Id.* at 15. And in 97% of cases, property owners were not advised of their rights prior to these interviews. *Id.* at 19. These practices ensured that "judges did not possess information from

interviews with the property owner when making their probable cause determination," which, the Inspector General observed, "could have provided the judge with a possible explanation for the banking transactions to consider before signing the seizure warrant." *Id.* at 16.

Therefore, the cases of Carole, Randy, and Karen are illustrations of a broader national effort to seize property from legitimate businesses based on the sweeping surveillance power of *Miller*. Thousands of other property owners have faced the same Orwellian nightmare.

1. The Internal Revenue Service used the categorical approach to the Third Party Doctrine to monitor Carole Hinders' bank account and wrongfully seize more than $32,000.

Carole Hinders opened Mrs. Lady's Mexican Food in Arnold's Park, Iowa, in 1977. Mrs. Lady's was a family restaurant run by Carole, her mother, and her son, Josh. Because the business accepted only cash and checks, Carole made frequent deposits at a nearby bank. She developed a habit of depositing less than $10,000 at a time because her mother explained that deposits over that amount required extra paperwork and hassle at the bank. Carole understood this to mean that she would be stuck filling out pointless forms every time she deposited money, so she followed her mother's advice.

While Carole intended to avoid red tape at the bank, she had no desire to evade federal bank reporting laws. She believed that the "paperwork" she was avoiding was internal bank paperwork. She had no idea that this paperwork might be required by federal law – or that avoiding this paperwork could possibly be a federal crime.

Carole's forfeiture nightmare began in 2013, when the IRS seized all the funds in Mrs. Lady's bank account – $32,820.56. Carole had no prior warning. Nobody from the government or her bank asked why Carole was depositing money in amounts under $10,000. Nobody warned her that this depositing behavior could expose her to criminal liability for "structuring" her deposits.

Had anyone bothered to ask, they would have learned that Carole had nothing to hide. Indeed, the government acknowledged that Carole obtained the seized money legally. There was never any allegation that she had used the money for an illegal purpose or neglected to pay taxes or other financial obligations. The *only* suggestion of wrongdoing that the government ever made against Carole was that she "structured" the lawfully earned receipts of her legitimate restaurant business when she deposited the money in the bank.

Instead, the government seized Carole's money first and asked questions later. After monitoring her bank account without judicial oversight, the government obtained a warrant to seize the account based on

the affidavit of an Iowa police officer acting under the aegis of an IRS task force. His investigation prior to the seizure consisted solely of reviewing Carole's history of bank deposits, a history available to him only due to the Third Party Doctrine. He identified 55 cash deposits into Mrs. Lady's account between April 2012 and February 2013. Of these deposits, just 37 were in amounts between $5,000 and $9,500; 15 were between $3,000 and $4,950; and 3 were between $1,000 to $2,200. Verified Compl. of Forfeiture In Rem (Doc. 1), Ex. 2: Affidavit of Christopher Adkins ¶ 13, *United States v. $32,820.56 in U.S. Currency*, No. C13-4102-LTS (N.D. Iowa filed Oct. 24, 2013). From these 55 deposits, the agent selected 22 made on consecutive banking days that, when combined, totaled more than $10,000. *Id.* ¶ 14. Based on this pattern of deposits alone, he drew the following conclusion: "[T]he person doing the transactions, herself or someone on her behalf, structured the cash transactions in Mrs. Lady's [bank account] to avoid the preparation and submission of [currency transaction reports]." *Id.* ¶ 15. Had the IRS agent asked Carole before seizing her bank account, he would have known that she had no desire to avoid currency transaction reports – a key element of the crime underlying the seizure of her account. *See United States v. Sweeney*, 611 F.3d 459, 469-70 (8th Cir. 2010); *accord United States v. Van Allen*, 524 F.3d 814, 820 (7th Cir. 2008); *MacPherson*, 424 F.3d at 189.

In the months following the seizure, Carole met with the government's attorneys and attempted to persuade them of their mistake. She explained the

innocent reasons for her depositing behavior and voluntarily produced business and accounting records showing that she had nothing to hide. These efforts proved fruitless, however, when the government filed a civil forfeiture complaint to take Carole's money.

The government's forfeiture complaint was, if anything, even more perfunctory than the affidavit supporting the seizure of her account. No effort was made to explain why Carole would have wanted to avoid federal bank reporting requirements; the government did not allege (for instance) that Carole was attempting to evade taxes or launder the proceeds of a criminal enterprise. *See* Verified Compl. of Forfeiture In Rem (Doc. 1), *United States v. $32,820.56 in U.S. Currency*, No. C13-4102-LTS (N.D. Iowa filed Oct. 24, 2013). From the beginning of the case, therefore, there was no dispute that Carole's money all came from a legal source – her legitimate restaurant.

Carole's misfortune became a topic of national debate when the *New York Times* reported on her case and those of two other small business owners ensnared in similar proceedings.[6] Many other media outlets – both local and national – picked up the story.[7] For

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[6] *See* Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 26, 2014, at A1, http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html.

[7] *See, e.g.*, *When the Government Charges Your Property With a Crime, Not You*, Iowa Public Radio, Nov. 5, 2014, iowapublicradio.org/post/when-government-charges-your-property-crime-not-you#stream/0 (45-minute interview with Carole and others); *Thieves in Suits*, Richmond Times-Dispatch, Oct. 29, 2014, www.richmond.

example, the *Des Moines Register* covered the case extensively and editorialized in favor of federal reforms in light of Carole's case.[8]

The IRS responded to these stories with official assurances that it would end its practice of seizing lawfully earned, lawfully spent money as it had done in Carole's case. This new IRS policy, first announced in the pages of the *New York Times*, prohibits agents from seizing money from a "legal source" (like a restaurant) based on "structuring" violations unconnected to another crime.[9]

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com/opinion/our-opinion/editorial-thieves-in-suits/article_aaac41c4-8e8c-5db5-9a8f-c1e67790b7fd.html (editorial calling for federal forfeiture reform).

[8] *Congress must end abuses of seizures by feds*, Des Moines Register, Nov. 8, 2014, www.desmoinesregister.com/story/opinion/editorials/2014/11/08/congress-must-stop-seizures/18728827/; Daniel P. Finney, *Forfeiture target calls it, 'a violation of civil rights'*, Des Moines Register, Nov. 2, 2014, www.desmoinesregister.com/story/news/crime-and-courts/2014/11/02/civil-forfeiture-iowa-carole-hinders-arnolds-park/18362299/.

[9] Under the new policy, depositing cash in amounts less than $10,000 "should be treated as just an indicator that another violation of law might have occurred [and that] [t]herefore, authorized investigative activities should be performed to determine the source of the funds and if there are other related violations of law that should be investigated prior to initiating a seizure of funds related to the criminal activities." *See* IRS, U.S. Dep't of Treasury, Memorandum for Special Agents in Charge: IRS Structuring Investigation Policy Changes (Oct. 17, 2014), *available at* http://ij.org/wp-content/uploads/2015/07/IJ068495.pdf; *Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, N.Y. Times, Oct. 25, 2014, www.nytimes.com/2014/10/26/us/statement-of-richard-weber-chief-of-irs-criminal-investigation.html.

The Department of Justice followed suit with similar policy changes a few months later.[10]

But the government did not immediately end its case against Carole. At the same time it was providing public assurances of reform, in court filings, the IRS continued to accuse Carole of wrongdoing. Government lawyers insisted on taking her deposition. When Carole told them the truth – that she never even knew about the bank reporting laws – they agreed to dismiss their case without prejudice. In an effort to avoid paying attorneys' fees, costs, and interest, however, the IRS reserved the right to refile the case.[11] *See United*

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[10] The Attorney General's memorandum and policy directive are available on the DOJ's website, www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/31/ag-memo-structuring-policy-directive.pdf.

[11] When Carole moved for attorneys' fees, costs, and interest under the Civil Asset Forfeiture Act of 2000 (CAFRA), 28 U.S.C. § 2465(b)(1), the government revived its threat to refile. Carole's motion was denied because the District Court, and later the Eighth Circuit, held that she did not "substantially prevail" within the meaning of CAFRA when the government dismissed its case without prejudice. *United States v. $32,820.56 in U.S. Currency*, 838 F.3d 930, 932, 937 (8th Cir. 2016). Nevertheless, judges at both levels chided the government for mistreating Carole. *See id.* at 938 (Erickson, J., concurring) ("The tortuous history of this case reflects an unwise exercise of discretion early on in the proceedings. It should have been apparent to the government and its agents that if Hinders had simply made daily cash deposits, no forfeiture question would have been raised."); *United States v. $32,820.56 in U.S. Currency*, 106 F. Supp. 3d 990, 995 (N.D. Iowa 2015) ("I fully understand the Claimants' frustration with this situation. After seizing their money and causing them to incur substantial expenses over a long period of time to fight that seizure, the Government elected to drop the case, effectively saying 'never

States v. $32,820.56 in U.S. Currency, 79 F. Supp. 3d 927 (N.D. Iowa 2015). Finally, the IRS released its hold on the $32,820.56 and returned all of the money to Carole's bank account – just over 21 months after it was seized.

2. Randy and Karen Sowers received the same treatment and had more than $62,000 wrongfully seized.

Randy and Karen had a similar experience, although they waited twice as long for the return of their money.

Randy and Karen run South Mountain Creamery – a dairy farm in Frederick County, Maryland. Randy and Karen's business is in the same rural community where they were born, married, and have lived their entire lives. They purchased their first 100 cows together in 1981. Since then, they have worked virtually without pause to care for their animals and grow their business. More than 30 years after opening their farm, they still wake before dawn every day to milk their cows.

Because of the nature of their business, Randy and Karen often deposit cash in the bank. Customers at farmers' markets frequently pay in cash and the size of Randy and Karen's cash deposits varies depending on the number of farmers' markets that they visit and

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mind.' The return of the seized funds hardly makes the Claimants whole.").

the amount of milk, eggs, and other products that they sell. Sometimes Randy and Karen have less than $10,000 in cash to deposit, but sometimes they have more.

Like Carole, Karen typically deposited cash in amounts under $10,000 because she was advised to do so. After one particularly busy weekend in 2011, a bank teller told Karen that cash deposits over $10,000 would require "paperwork." The teller suggested that this paperwork would be time-consuming for bank personnel to fill out and that Karen could make life easier for bank employees by keeping the size of her deposits under $10,000. Karen did not know what this paperwork involved. The teller said nothing about the IRS, and, for all Karen knew, the paperwork was required by internal bank rules with no connection whatsoever to the federal government. Karen generally kept some cash on hand to make change and to help cover expenses at the store and, given the teller's advice, it seemed reasonable to hold enough cash in reserve to keep the size of the deposits under $10,000. Karen did this to avoid red tape at the bank – not to hide information from the IRS.

Without any notice, in February 2012, the IRS seized the farm's entire bank account, containing $62,936.04. Apart from the act of depositing cash in amounts less than $10,000, the government never even *alleged* that Randy and Karen did anything illegal.

After taking Randy and Karen's money, the government presented them with an offer they could not

afford to refuse. They could go to court and fight for months or even years to contest the forfeiture – likely spending more in attorney fees than the amount that had been seized – or they could agree to forfeit $29,500 of the approximately $63,000 that was taken. Even though Randy and Karen believed they had done nothing wrong, they needed the seized money for their farming operations and could not afford a protracted legal battle to prove their innocence. So, like other property owners faced with this choice, Randy and Karen reluctantly agreed to forfeit $29,500 of their hard-earned money.

After the IRS and DOJ changed their structuring policies, Randy and Karen filed a petition with the government seeking the return of their $29,500. *See* Pet. for Remission or Mitigation (July 16, 2015), *available at* http://ij.org/wp-content/uploads/2015/07/irs-forfeiture-petitions-randy-sowers-petition.pdf. Their petition got a boost when Members of Congress condemned what had happened to them at a hearing where Randy was called to testify. *See id.*, Ex. C at 86 (statement of Rep. Crowley) ("Mr. Sowers . . . I don't think you, nor any of the gentlemen before us today, deserve to be treated by your Government, by the IRS, in the way in which you have been."). Representative John Lewis told Randy, "as one Member of Congress and a member of this committee, I want to apologize to you for . . . what the IRS did to you." *Id.*, Ex. C at 93.

In June 2016, the Department of Justice granted Randy and Karen's petition and returned their $29,500. The four-year span of this legal drama was

extremely difficult for Randy and Karen. Randy was forced to scramble to replace money that he had planned to use to buy supplies for that year's crops and ultimately had to divert money that he otherwise would have used to pay off debts or grow the business. Meanwhile, although Karen has always been careful to avoid bouncing checks, she found herself forced to explain to business partners why scheduled transactions were not going through. The bank where they had done business over a decade summarily closed their account. Randy and Karen worried that people would assume they must have committed a serious violation of the law to have had their money seized, and in fact they became aware that they were the subject of hurtful gossip in their community. Karen found the situation so stressful that she became ill. And Randy was left wondering how something like this could possibly happen in America.

II. This Court Should Reject the Categorical Approach to the Third Party Doctrine.

What happened to Randy, Karen, and Carole was possible only because there is no constitutional limitation on blanket surveillance of people's banking practices. Their experiences should give this Court pause before extending the categorical rule of *Miller* to the world of cell-site-location information (CSLI). As one member of this Court has pointed out, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is

ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (citations omitted). Such caution is warranted in the realm of CSLI because, even using present-day technology, CSLI can reveal far more about a person's private affairs than bank records ever could. As shown below, these considerations counsel against applying a pre-digital precedent like *Miller* to this digital-age case.

A. Applying the categorical approach of *Miller* to the cell-site-location information in this case would lead to the same dragnet surveillance of phone information that the nation has experienced in banking.

When this Court decided *Miller*, in 1976, computer technology was in its infancy. Computer usage was uncommon and most business records were kept on paper. Although data mining – the practice of using computer algorithms to search vast collections of data for patterns – is common practice in business and government today, it was barely a concept in the late 1970s. In other words, despite the sweeping surveillance power created by *Miller*, practical technological limitations ensured that the Third Party Doctrine, even if fully exploited by law enforcement, could have only a limited impact on privacy. But in the years since *Miller*, widespread advances in computer technology have given government the capacity to search broad

swaths of data looking for suspicious activity. This in turn has led to innocent people becoming ensnared in civil forfeiture proceedings, in which the government can profit from seizing property without charging a person with any crime.

This past is prologue; it demonstrates the threat that a categorical Third Party Doctrine poses to property rights and privacy in the digital age. As other *amici* have pointed out, cell phones are no longer a luxury; instead, more than 91% of American adults own a cell phone and most carry it with them everywhere they go. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* in Support of Certiorari at 4. Everyone who uses a cell phone generates CSLI, just as everyone who uses a bank generates bank records. But CSLI reveals far more about a person than any conventional bank record could and does so on a scale unrivaled even by the staggering amount of bank reporting that occurs every day in this country. *See*, *supra*, pp. 11-13.

Each time a cell phone connects to a cell tower, it generates information about where the phone was located at that moment in time. This happens with surprising frequency: Cell phones connect with towers on average every seven to nine minutes – or between 160 and 205 times per day – although they can connect as frequently as every seven seconds. *See* Brief for Electronic Frontier Foundation et al. as *Amici Curiae* in Support of Certiorari at 9. As cell phone and data usage have both increased, the number of cell towers has increased, as well, leading to more precise location information about individual users. Using current

technology, cell companies can provide an accurate picture of a phone's location to within 50 meters. *Id.* at 11. As technology continues to improve, CSLI is likely to provide an ever-more detailed picture of a person's movements. *See In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 755 (S.D. Tex. 2005) (noting the "combination of market and regulatory stimuli ensures that cell phone tracing will become more precise with each passing year"). Past experience with technology suggests what today can be measured within 50 meters will, in just a few years, be measurable to within five.

This increasingly granular picture of a person's movements provides law enforcement with a powerful tool to fight crime, but it also raises chilling privacy concerns. Just as GPS tracking "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations," *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring), so too with CSLI. It seems likely that, within a few years, CSLI will be able to place a person within a particular room in their home. *See* Brief for Electronic Frontier Foundation et al. as *Amici Curiae* in Support of Certiorari at 15 (noting that the ACLU was able to use CSLI to "infer details about [a person's] patterns of movement, including when he and his pregnant wife visited her obstetrician, when he traveled to or from his home, and nights he spent away from home") (citation omitted). Even today, by comparing the CSLI of one person to that of another, law enforcement can diagram a

person's associations and lifestyle, including such intimate information as whether that person is expecting a child. *See id.*

The Stored Communications Act, 18 U.S.C. § 2703, offers inadequate privacy protections in such situations. *See* Brief for Petitioner at 47-53. Nothing in the Act prohibits the bulk collection of cell phone records when the government shows "specific and articulable facts" that the records are "relevant and material to an ongoing criminal investigation." *See* 18 U.S.C. § 2703(b), (d). In practice, this is a low bar. In this case, law enforcement obtained five-months' worth of CSLI for six different suspects. *See* Pet. App. 49a-61a. At least nine other phone numbers were swept up in the investigation, as reflected in the District Court's record. *See* United States' Combined Br. & Resp. to Defs.' Mots. in Limine, Ex. 2, at 2-3, *United States v. Carpenter*, No. 2:12-cr-20218-SFC-MKM-4 (E.D. Mich. filed Dec. 24, 2013), ECF No. 221-2. Indeed, prosecutors in this case successfully argued that "relevant and material" is a low standard. *See* Brief for Petitioner at 48 (quoting J.A. 34) ("We merely have to show there's a criminal investigation of a crime."). Moreover, what matters here is not the statutory minimum set by Congress, but the constitutional minimum set by this Court.

If CSLI is categorically exempt from Fourth Amendment protection, it is reasonable to presume that the government would obtain CSLI to track people over the course of weeks, months, or even years. Computer algorithms could then mine that data,

looking for instances when people went to the "wrong" neighborhood, business, or home, or when they associated with the "wrong" individuals. The government could build a portrait of a person's friends, family, and associates. And, when a crime is committed, everyone in the vicinity could be easily located and their movements reconstructed.

Police and prosecutors could use this information for criminal prosecutions or they could use it to pursue civil forfeiture without charging a crime. Past experience suggests that they would often choose civil forfeiture. Department of Justice statistics show that, between 1997 and 2013, 87% of forfeitures were pursued in civil, not criminal cases. Institute for Justice, *Policing for Profit*, at 12-13. This means that the owner of seized property is almost *seven times* more likely to face a civil forfeiture proceeding than a criminal proceeding. In a civil proceeding, the property owner will have no right to an attorney, the government's burden is a mere preponderance of the evidence, and an innocent third-party will bear the burden of proving her innocence. By comparison, in a criminal proceeding, there *is* a right to an attorney and the burden is squarely on the government to prove its case beyond a reasonable doubt. No wonder that government strongly prefers civil cases. This already bad situation for property owners would only be made worse if the government enjoys warrantless access to CSLI.

For example, imagine a case involving a roadside seizure of cash. Police find a man traveling with $5,000 in his car. He claims the money constitutes his

personal savings, but police are suspicious he is transporting drug proceeds. No drugs are found, but police are able to use CSLI to place the man at the residence of a convicted drug dealer hours before he was pulled over. In the world of civil forfeiture, where the government's only burden is to show a preponderance of the evidence, this would likely be enough to forfeit the man's money (and possibly his car), even though it would never be sufficient to convict him of a crime. *See, e.g.*, *United States v. Funds in the Amount of $30,670*, 403 F.3d 448, 469 (7th Cir. 2005) (combination of dog sniff and circumstantial evidence sufficient to establish forfeitability of seized currency at summary judgment); *United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658, 662 (6th Cir. 2003) (affirming summary judgment for the government based on property owners' lack of legitimate income and absence of rebuttal showing a legitimate source). Even if the officers' suspicions turned out to be wrong because the man could affirmatively demonstrate a legitimate source for his funds, nothing would stop them from seizing his money on the side of the road. Seizure, with no judicial oversight, could be based on a warrantless review of CSLI, thereby placing the burden on the property owner to get a lawyer and fight the seizure in court – a fight that, as shown above, can take property owners months, if not years, to win.

Interposing a warrant requirement in these circumstances would make wrongful seizures less likely. Certainly, a warrant requirement is not cost free. Warrants require time and effort on the part of officers,

prosecutors, and courts. But the absence of a warrant requirement also has a cost. Warrantless searches of CSLI will inevitably lead to wrongful seizures, which will force property owners to expend weeks, months, even years working to recover their lawful money. Indeed, as illustrated by the experiences of Carole, Randy, and Karen, there is a human cost when the government accuses an innocent person of wrongdoing, a cost that remains even when the innocent are ultimately vindicated.

Through this lens, this Court should consider the consequences of holding that CSLI is categorically unprotected by the Fourth Amendment. This case concerns one man's crime spree, but the rule announced here will affect innocent people as much (if not more) than criminals. If the Court gives the government unfettered access to CSLI, innocent people's movements, habits, and associations will become known to the government. Past experience suggests that many of these innocent people will be drawn into civil forfeiture proceedings. Sometimes the government will get it right; other times it will wrongly seize property, just as it did in Carole, Randy, and Karen's cases. Rejecting the categorical approach of *Miller* would at least impose a measure of judicial scrutiny in an area of the law which sorely needs it.

B. The Court should reject the categorical approach to the Third Party Doctrine and instead adopt a real-world approach that scrutinizes positive law, including statutes and private contracts.

The categorical approach to the Third Party Doctrine, as articulated by cases like *Miller* and *Smith*, has proven itself to be a failure. By holding that a person loses all constitutional protection in any information that person has entrusted to another private party, even when those parties explicitly agreed to keep such information private, *Miller* and *Smith* have enabled the very kind of dragnet surveillance that the Fourth Amendment is meant to stand guard against. This infirmity, coupled with the powerful financial incentive underlying civil forfeiture, has had disastrous effects on ordinary Americans like Carole Hinders and Randy and Karen Sowers. A decision extending the categorical approach to the Third Party Doctrine into the world of CSLI would unleash a parade of horribles even worse than the experiences of *amici* described above.

Thankfully, this Court can choose a wiser path. Rather than asking whether a person who shares information retains a reasonable expectation of privacy in that information, this Court should refine its approach to ask a more pertinent question: Is the government demanding access to information that would otherwise be unavailable to private parties? This has been called the "positive law" approach to the Third

Party Doctrine because it would evaluate the government's power to search a person and seize their things based on what the law allows private individuals to do. *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1871-77 (2016). The virtue of the positive law model is that it embodies a simple yet powerful intuition: That when government officials use their power to obtain information in a manner that would be prohibited for private actors, those officials must demonstrate the reasonableness of their actions under the Fourth Amendment. Thus, by requiring that a neutral magistrate determine that there is probable cause for an investigation, the positive law model helps ensure the unique powers of government actors are checked by an independent judiciary.

The positive law model proposed by Professors Baude and Stern is far more protective of an individual's privately shared information than the current Third Party Doctrine. This is because, rather than holding that such information is categorically unprotected, the new model would ask if the government's efforts rest on conduct to which officials hold some special privilege. And that answer, in turn, would rest not on abstract notions of "reasonable expectations of privacy," but instead on the concrete statutory and contractual arrangements that form the positive legal background.

This approach offers a fresh perspective on this case. Under the positive law model, the government

would be required to meet Fourth Amendment reasonableness standards before obtaining CSLI because cell phone companies are legally prohibited from disclosing their customers' location information to other private parties "without the express prior authorization of the customer." 47 U.S.C. § 222(f). Under reasonableness analysis, government attempts to coerce or compel the disclosure of such information would almost certainly require a warrant – and therefore a finding of probable cause by a neutral magistrate – for the simple reason that background principles of property and contract law rarely if ever empower private individuals to compel a third party to disclose information.

Implementing this model does not require a wholesale revision of Fourth Amendment jurisprudence. *See* Richard M. Re, *The Positive Law Floor: Responding to William Baude & James Y. Stern, The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. F. 313 (2016). It only requires that the government justify its actions under the Fourth Amendment when it has intruded on someone's privacy in a manner that a private party could not. This approach would resolve the problems caused by the categorical Third Party Doctrine, provide firmer guidance to lower courts, and retain the ability of courts to find that a "reasonable expectation of privacy" has been violated even in instances where the positive law model is not triggered.

A degree of individualized judicial scrutiny is also nothing to fear. Requiring that the government meet

Fourth Amendment reasonableness standards would both ensure that the government's actions are reasonable in each particular instance and, more broadly, would protect against the government's assembly of a digital dragnet that could enable widespread location monitoring. And, perhaps most importantly, it would help to guard against the kind of forfeiture horror stories experienced by *amici* and countless others.

CONCLUSION

Forty-one years ago, in *United States v. Miller*, this Court announced a categorical rule that applied the Third Party Doctrine to allow the warrantless search and seizure of Americans' banking information. The decision in *Miller* has had disastrous effects in banking. If that same categorical approach were applied to CSLI, it could make vastly more sensitive information available to the government without a warrant. The Fourth Amendment's warrant requirement should not be read out of the Constitution in this way. Police and prosecutors should be required to show probable cause to a neutral magistrate before they can scrutinize the digital information that, in this day and age,

we are all passively creating about ourselves every hour of every day.

Respectfully submitted,

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